No. 98-208

Supreme Court, U.S.
FILED
DEC 21 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; THE NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; THE NATIONAL WOMEN'S LAW CENTER; THE NATIONAL ORGANIZATION FOR WOMEN LEGAL DEFENSE AND EDUCATION FUND; THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

JAMES M. FINBERG
Counsel of Record
JONATHAN D. SELBIN
JOSHUA P. DAVIS
PAULINA DO AMARAL
LIEFF, CABRASER, HEIMANN
& BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111-3339
Telephone (415) 956-1000

Attorneys for Amici Curiae

[Additional Counsel listed on inside cover]

39pp

JACK W. LONDEN
DANIEL F. KOLB
CO-CHAIRS
NORMAN REDLICH
TRUSTEE
BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR
TERESA A. FERRANTE
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1450 G Street N.W.
Suite 400
Washington, D.C. 20005
Telephone: (202) 662-8600

DENNIS C. HAYES
GENERAL COUNSEL
WILLIE ABRAMS
ASSISTANT GENERAL
COUNSEL
NATIONAL ASSOCIATION FOR
THE ADVANCEMENT
OF COLORED PEOPLE
4805 Mt. Hope Drive
Fifth Floor
Baltimore, MD 21215
Telephone: (410) 486-9191

ANTONIA HERNANDEZ, PRESIDENT
PATRICIA MENDOZA,
REGIONAL COUNSEL
CHICAGO OFFICE
AMALIA RIOJA,
STAFF ATTORNEY
CHICAGO OFFICE
MALDEF
634 South Spring Street
Eleventh Floor
Los Angeles, CA 90014
Telephone: (213) 629-2516

JUDITH L. LICHTMAN
DONNA R. LENHOFF
NATIONAL PARTNERSHIP FOR
WOMEN & FAMILIES
1875 Connecticut Avenue, N.W.
Suite 710
Washington, DC 20009
Telephone: (202) 986-2600

JUDITH C. APPELBAUM
NATIONAL WOMEN'S LAW
CENTER
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
Telephone: (202) 588-5180

Attorneys for *Amici Curiae*

MARTHA F. DAVIS
YOLANDA S. WU
NOW LEGAL DEFENSE AND
EDUCATION FUND
99 Hudson Street, 12th Floor
New York, NY 10013
Telephone: (212) 925-6635

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
Telephone: (212) 549-2611

Attorneys for *Amici Curiae*

TABLE OF CONTENTS

		Page
I.	STATEMENT OF INTEREST	1
II.	SUMMARY OF ARGUMENT	4
III.	ARGUMENT	6
A.	History of the Act.	6
B.	The *En Banc* Majority Opinion is at Odds with the Plain Meaning of the Statute; The "Reckless Indifference" Provision Cannot Be Read to Require Either "Egregious Conduct" or "Outrageousness".	11
C.	This Court Has Defined "Reckless Indifference" to Mean Less Than Outrageous or Egregious Conduct in Numerous Contexts, Including Interpretation of Other Anti-Discrimination Statutes.	14
D.	The Legislative History of the Civil Rights Act of 1991 Offers No Basis for the "Outrageous Conduct" Standard.	19
E.	The En Banc Majority's Opinion Conflicts with this Court's Past Decisions.	21
F.	The Stated Purpose of the 1991 Civil Rights Act Is to Expand Civil Rights Remedies, Not Make Them Less Accessible.	23

G. The Reckless Indifference Standard Is Sound Policy. 24

IV. CONCLUSION 28

TABLE OF AUTHORITIES

Page(s)

CASES

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 7, 27

Annis v. County of Westchester,
136 F.3d 239 (2d Cir. 1998) 10

Barbour v. Merrill,
48 F.3d 1270 (D.C. Cir. 1995) 16

Beauford v. Sisters of Mercy,
816 F.2d 1104 (6th Cir.), *cert. denied*, 484 U.S. 913 (1987) 19

Beecham v. U.S.,
511 U.S. 368 (1994) 27

BMW v. Gore,
517 U.S. 559 (1996) 22

Bragdon v. Abbott,
___ U.S. ___, 118 S. Ct. 2196 (1998) 17

City of Newport v. Fact Concerts,
453 U.S. 247 (1981) 10

Dunn v. Commodity Futures Trading Commission,
519 U.S. 465 (1997) 12

Faragher v. City of Boca Raton,
___ U.S. ___, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) 8

Franks v. Bowman Transportation Co.,
424 U.S. 747 (1976) 26

Gertz v. Robert Welch Inc.,
418 U.S. 323 (1974) 16

Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993) .. 5, 12, 13, 15-17, 21, 22, 24, 25

Hennessy v. Penril Datacomm Networks,
69 F.3d 1344 (7th Cir. 1995) 10

Hetzel v. County of Prince William,
89 F.3d 169 (4th Cir.), *cert. denied*, 519 U.S. 1028 (1996) 10

Hicks v. Brown Group, Inc.,
902 F. 2d 630 (8th Cir. 1990) 16

Hudson v. Reno,
130 F.3d 1193 (6th Cir. 1997), *cert. denied*, ___ U.S. ___ 119 S. Ct. 64 (1998) 14

I.N.S. v. Phinpathya,
464 U.S. 183 (1984) 12

International Union v. Johnson Controls, Inc.,
499 U.S. 187 (1991) 25

Kolstad v. American Dental Ass'n.,
139 F.3d 958 (D.C. Cir. 1998) 5, 13, 19, 21

Kramer v. Logan County School District No. R-1,
157 F.3d 620 (8th Cir. 1998) 13

Landgraf v. USI Film Products, et al.,
511 U.S. 244 (1994) 23, 26

McKinnon v. Kwong Wah Restaurant,
83 F.3d 498 (1st Cir. 1996) 10

McLaughlin v. Richland Shoe Co,
486 U.S. 128 (1988) 16

Merriweather v. Family Dollar Stores of Indiana, Inc.,
103 F.3d 576 (7th Cir. 1996) 10

Patterson v. P.H.P. Healthcare Corp.,
90 F.3d 927 (5th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997) 10

Rowlett v. Anheuser-Bush, Inc.,
832 F. 2d 194 (1st Cir. 1987) 16, 19, 26

Smith v. Wade,
461 U.S. 30 (1983) 5, 15, 16, 18, 19, 20, 21, 26, 27, 28

Swanson v. Elmhurst Chrysler Plymouth,
882 F.2d 1235 (7th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990) 6

Tcherepnin v. Knight,
389 U.S. 332 (1967) 24

Trans World Airlines, Inc. v. Thurston,
469 U.S. 111 (1985) 5, 15, 16, 21, 22

Unexcelled Chemical Corp. v. U.S.,
345 U.S. 59 (1953) 12

United States v. Wiltberger,
5 Wheat. 76 (1820) 12

Williams v. Pharmacia, Inc.,
137 F.3d 944 (7th Cir. 1998) 13

Williamson v. Handy Button Mach. Co.,
817 F.2d 1290 (7th Cir. 1987) 16

FEDERAL CONSTITUTION AND STATUTES

United States Constitution, Seventh Amendment 10

United States Constitution, Fourteenth Amendment 22

Age Discrimination in Employment Act .. 16, 21, 22, 24, 25

Americans with Disabilities Act 13, 15

Civil Rights Act of 1991 ..... *passim*

§ 2 of the Civil Rights Act of 1991 ..... 9, 23

§ 3 of the Civil Rights Act of 1991 ..... 8, 23

Fair Labor Standards Act 16

Rehabilitation Act of 1973 ..... 13, 15

Title VII of the Civil Rights Act of 1964,
42 U.S.C. §§ 2000e *et seq.* ..... *passim*

§ 703(e)(1) of Title VII of the Civil Rights Act of 1964 .. 25

Title IX of the Education Amendments of 1972,
20 U.S.C. § 1681 7

29 U.S.C. § 626(b) 7

42 U.S.C. § 1981 ..... 7, 16, 17, 18, 20

42 U.S.C. § 1981a 13, 14, 20

42 U.S.C. § 1981a(a)(1) 14

42 U.S.C. § 1981a(a)(2) 13

42 U.S.C. § 1981a(a)(3) 13

42 U.S.C. § 1981a(b)(1) ... 4, 5, 12, 13, 14, 15, 18, 26, 28

42 U.S.C. § 1981a(b)(2) 13

42 U.S.C. § 1981a(b)(3) 14

42 U.S.C. § 1981a(d)(1) 25

42 U.S.C. § 1983 16

42 U.S.C. § 2000e-5 13

42 U.S.C. § 2000e-5(g) 9, 13

LEGISLATIVE HISTORY

Pub. L. 102-166, 105 Stat. 1071 ..... 8, 9

Rep. Don Edwards, 137 Cong. Rec. H 9527 (daily ed., Nov. 7, 1991) 13

Rep. Ford, 137 Cong. Rec. H 9549 (daily ed., Nov. 7, 1991) 20

Rep. Hyde, 137 Cong. Rec. H 9543 (daily ed., Nov. 7, 1991) 20

Report of the House Committee on Education and Labor, H. REP. 102-40(I) (102nd Cong., 1st Sess.) 1991 U.S.C.C.A.A.N. 549 .... 4, 7, 9, 19, 20

Report of the House Committee on the Judiciary, H. REP. 102-40(II) 1991 U.S.C.C.A.A.N. 694 . 7, 9, 20, 21

Report of the Senate Committee on Labor and Human Resources, S. Rep. 101-315 (101st Cong., 2d Sess.) (1990) 4, 6, 19, 20

Sen. Danforth, *et al.*, Cong. Rec. S 15483 (daily ed., Oct. 30, 1991) 20

Sen. Kennedy, 136 Cong. Rec. S 9969 (daily ed., July 18, 1990) 4

TREATISES

Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals, 522-32 (1960) 24

Restatement (Second) of Torts 17

Restatement (Second) of Torts, § 908 ..... 17, 18, 19

ARTICLES

Barbara Mathias, *Washington Post*, November 5, 1991, p. B5, "The Harassment Hassle; Women Who Win Their Suits Sometimes Seem to Pay the Higher Price 6

I. STATEMENT OF INTEREST[1].

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights organization, founded in 1963 by the leaders of the American Bar, at the request of President Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C. Through the Lawyers' Committee and its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country, including a large number of cases challenging racial discrimination in employment.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The NAACP has state and local affiliates throughout the nation, including the State of Maryland

---

[1/]Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, the amici state that this brief was not authored in whole or part by counsel for any party and that no party or entity, other than the amici and their counsel, made any monetary contribution to its preparation or submission.

where it maintains its national headquarters. The fundamental mission of the NAACP includes promoting equality of rights, eradicating caste and race prejudice among the citizens of the United States and securing for African Americans and other minorities increased opportunities for employment. The NAACP has appeared before courts throughout the nation in numerous important civil rights cases.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national not-for-profit organization that protects and promotes the civil rights of more than 29 million Latinos living in the United States. MALDEF is particularly dedicated to securing such rights in the areas of employment, education, immigration, political access and public resource equity. The question presented by this case is of great interest to MALDEF because it implicates the scope of the remedies available to victims of discrimination, as well as how courts should view the act of intentional discrimination itself.

The National Partnership for Women & Families, a nonprofit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex and other forms of invidious workplace discrimination and has filed numerous briefs amicus curiae in the United States Supreme Court and in the federal circuit courts of appeal to advance women's opportunities in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. NWLC has worked since 1972 to secure equal opportunity

in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964, and NWLC played a leading role in urging the enactment of the Civil Rights Act of 1991, and in particular its inclusion of compensatory and punitive damages as remedies for victims of sexual harassment and other forms of sex discrimination.

The National Organization for Women Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women as a separate organization. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting employment discrimination. NOW LDEF has appeared before this Court, both as direct counsel and as *amicus*, in numerous employment discrimination cases.

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Title VII is one of the nation's most important antidiscrimination statutes and its effective enforcement is therefore a matter of great concern to the ACLU and its members. The ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

All of the *amici* were closely involved with the enactment of the Civil Rights Act of 1991, and in particular with the provision of common-law damages as a remedy for

intentional discrimination under Title VII of the Civil Rights Act of 1964 and under other civil rights laws. The *amici* provided information to Congress through testimony on behalf of the organizations, through contacts with members of Congress and their staff, through explanations provided to Committee staff, and through the identification of victims and other potential witnesses for Committee staff to consider as potential witnesses in hearings.[2]

II. SUMMARY OF ARGUMENT.

The 1991 Civil Rights Act (the "Act"), provides, in relevant part:

> A complaining party may recover punitive damages under this section . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice *or with reckless indifference* to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(b)(1) (emphasis supplied). The plain meaning of this provision is that once a plaintiff has put forward sufficient evidence to go to the jury on the issue of intentional discrimination, he or she may also go to the jury on the question of punitive damages, if the defendant's conduct was undertaken with malice or reckless indifference to the plaintiffs' legal rights.

---

[2] *See*, for example, the Report of the Senate Committee on Labor and Human Resources, S. REP. 101-315 (101st Cong., 2d Sess.) at 8-9 (1990) (listing witnesses); the Report of the House Committee on Education and Labor, H. REP. 102-40(I) (102nd Cong., 1st Sess.) at 17-18, 1991 U.S.C.C.A.A.N. 549, 555-56 (listing witnesses); statement of Sen. Kennedy, 136 Cong. Rec. S 9969 (daily ed., July 18, 1990).

The *en banc* majority opinion below in *Kolstad v. American Dental Ass'n.*, 139 F.3d 958 (D.C. Cir. 1998), held that punitive damages may be imposed in a Title VII case only upon a showing that the employer acted with actual malice or that its conduct was "egregrious." In so holding, the *en banc* majority interprets the Act in a manner that conflicts with its plain meaning, that conflicts with Congress' stated purposes in enacting the Act, and that conflicts with well-settled precedent in anti-discrimination law. The *en banc* majority opinion creates a standard for punitive damages that would unduly burden plaintiffs seeking recovery from defendants who intentionally discriminated against them with reckless indifference to their rights.

To create its standard that punitive damages in a Title VII case may be imposed only on a showing of egregious conduct, the *en banc* majority below engaged in a tortured analysis of the statute, necessarily either removing the phrase "reckless indifference" from it, or adding the phrase "egregious conduct" to it. Neither possibility is consistent with the plain meaning of the statute. This Court has repeatedly rejected such an approach, most recently in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), refusing to engraft onto the ADEA an "outrageous conduct" standard identical to the "egregious conduct" standard that the *en banc* majority adopts with respect to Title VII. *Id.* at 615-16. In enacting Section 1981a(b)(1) Congress legislated against the backdrop of a line of cases — including *Smith v. Wade*, 461 U.S. 30 (1983), and *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) — that had established a precise meaning for the concept of "reckless indifference," that this Court unanimously reaffirmed in *Hazen*. The Act should be read in a manner consistent with its plain meaning, consistent with Congress' express purpose in enacting it, and consistent with this Court's precedents.

III. ARGUMENT.

A. History of the Act.

One of the fundamental problems driving the effort to pass the Civil Rights Act of 1991 was the inadequacy of remedies for intentional violations of Title VII. For example, if the only relief available for a sexually discriminatory denial of promotion was back pay and the possibility of an order of instatement, the plaintiff had to engage in a legal effort disproportionate to the limited back pay at stake, and could not recover anything for the stress or humiliation she may have suffered. In some instances, the victim's rights were grievously violated but she was left without any remedy because she lost no pay from the violation, and could not benefit from an injunction because she had left the workplace for nondiscriminatory reasons.[3] The Reports of the House

[3]*E.g.*, *Swanson v. Elmhurst Chrysler Plymouth*, 882 F.2d 1235, 1240 (7th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990). Patricia Swanson, the plaintiff, was found to have been sexually harassed but lost no pay because of it and lost her job for other reasons. She did not obtain even a dollar in nominal damages because of the lack of a damages remedy, so the court reversed her award of attorneys' fees and ordered that judgment be entered for the defendant. Her proof of sexual harassment was not even adequate under the law at the time to spare her the additional humiliation of being forced to pay her harasser's court costs. Barbara Mathias, *Washington Post*, November 5, 1991, p. B5, "The Harassment Hassle; Women Who Win Their Suits Sometimes Seem to Pay the Higher Price." Indeed, Ms. Swanson testified at a Congressional hearing on the vetoed 1990 precursor of the Civil Rights Act of 1991. Report of the Senate Committee on Labor and Human Resources, S. REP. 101-315 (101st Cong., 2d Sess.) at 8 (listing the witnesses at the February 27, 1990, hearing).

Committee on Education and Labor, and of the House Committee on the Judiciary, are replete with such examples.[4]

In addition, the remedies available for intentional violations of Title VII did not include the common-law compensatory and punitive damages that are available for violations of 42 U.S.C. § 1981 and for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681. The Title VII remedies did not even include the punitive "liquidated damages" available for violations of the Age Discrimination in Employment Act, 29 U.S.C. § 626(b). As a result, in our view, many employers felt before November 21, 1991, that the stakes did not justify any rigorous program of preventing or curing discrimination that violates Title VII.

For more than twenty years, this Court has recognized the importance of an adequate financial "spur" or "catalyst" to prod employers to examine their practices and prevent discrimination from occurring. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975), this Court emphasized the importance of deterring discrimination and stated:

> Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide(s) the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to

[4]H.REP. 102-40(I) at 66-69, 1991 U.S.C.C.A.A.N. 549, 605-07; H.REP. 102-40(II) at 24-28, 1991 U.S.C.C.A.A.N. 694, 717-21.

> eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

(citation omitted.) *Faragher v. City of Boca Raton*, ___ U.S. ___, ___, 118 S. Ct. 2275, 2292, 141 L. Ed 2d 662 (1998), continued the Court's emphasis on the deterrence of discrimination and on framing rules of law to encourage employers to prevent discrimination:

> It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.

In *Faragher*, this Court also referred to "Title VII's equally basic policies of encouraging forethought by employers." *Id.* The lack of punitive and compensatory damages prior to the 1991 Act meant that the "spur or catalyst" was too weak to serve its intended function.

In countless meetings, *amici* explored with members of Congress the experiences of numerous litigants that illustrated the need for both types of common-law damages. After two years of consideration, Congress agreed. Section 3 of the Civil Rights Act of 1991 stated that the "purposes of this Act" are in part "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace." Pub. L. 102-166, 105 Stat. 1071.

The need for a stronger deterrent to intentional discrimination was a driving force for the provision of compensatory and punitive damages. Based in large part upon the information provided by *amici*, Congress determined that back pay and front pay were insufficient to deter and prevent discrimination.[5] Section 2 of the 1991 Act states that Congress finds that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace," and that "legislation is necessary to provide additional protections against unlawful discrimination in employment." *Id.*

Congress clearly intended the provision of punitive damages to provide part of the cure for the problems it saw. Narrowing the applicability of this remedy so as to make it unavailable in most cases defeats the intent of Congress and reinstates the problems Congress sought to cure. Such a narrowing assumes that compensatory damages alone will be sufficient to satisfy the purposes of Congress. Postponing for a moment discussion of the fact that this is not what Congress enacted, we submit that the inadequacy of compensatory damages alone is plain from the nature of the difference between the two types of common-law damages.

Compensatory damages under the 1991 Act are exclusive of back pay and all of the relief traditionally awarded under § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g). Their measure is generally the extent of the emotional distress

---

[5]Report of the House Committee on Education and Labor, H.REP. 102-40(I) at 69-71, 1991 U.S.C.C.A.A.N. 549, 607-09; Report of the House Committee on the Judiciary, H. REP. 102-40(II) at 27, 1991 U.S.C.C.A.A.N. 694, 721.

suffered by the plaintiff or class member,[6] and is sometimes modest.[7] The measure of punitive damages is the extent of the culpability of the defendant's mental state and the amount necessary to deter the defendant from engaging in repetition of the conduct.[8] Because victims vary greatly in their individual injuries, some compensatory damages awards are substantial and others are modest. However, neither a substantial nor a modest recovery of compensatory damages addresses the severity of the defendant's culpability nor the question of whether the amount awarded is sufficient to deter the defendant from future violations as to the plaintiff or others.

Barring awards of punitive damages in the vast majority of cases will undo one of the most salutary provisions in the Civil Rights Act of 1991, effectively repealing a significant

---

[6]Proof of the victim's emotional injury is often supported by expert testimony or by the detained testimony of the victim or of the victim's friends or family members. *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498 (1st Cir. 1996); *Annis v. County of Westchester*, 136 F.3d 239 (2d Cir. 1998); *Hetzel v. County of Prince William*, 89 F.3d 169 (4th Cir.), *cert. denied*, 519 U.S. 1028 (1996); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997).

[7]*E.g., Hennessy v. Penril Datacomm Networks*, 69 F.3d 1344 (7th Cir. 1995) (jury found liability but did not award compensatory damages); *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498 (1st Cir. 1996) ($2,500 to each plaintiff as compensatory damages for emotional distress); *Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576, 581 (7th Cir. 1996) (reducing $25,000 award by 25%). Remittiturs must, of course, be exercised in a manner consistent with the Seventh Amendment right of trial by jury.

[8]*City of Newport v. Fact Concerts*, 453 U.S. 247, 266-67 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.").

remedy adopted by Congress after a great national debate, and once again leaving many victims of intentional civil rights violation without an adequate remedy. Victims in the vast number of cases, which the court below characterized as "garden variety," may once again find it hard to obtain counsel, and employers will have a significantly reduced incentive to monitor and correct the discriminatory actions of their supervisors and other officials. *Amici* submit that the lower court should have respected, rather than replaced, the judgment of Congress.

B. The *En Banc* Majority Opinion is at Odds with the Plain Meaning of the Statute; The "Reckless Indifference" Provision Cannot Be Read to Require Either "Egregious Conduct" or "Outrageousness".

The most basic of all canons of statutory construction is that the starting point for any inquiry into the meaning of a statute is its words, and that statutes mean what they say. It is not the province of courts to read language into or out of statutes that are unambiguous. As Chief Justice Marshall wrote almost two centuries ago:

> [The] intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a strong one indeed, which would justify a court into parting from the plain meaning of the words . . . in search of an intention which the words themselves did not suggest.

United States v. Wiltberger, 5 Wheat. 76, 95-96 (1820). Justice Black similarly wrote for the Court in *Unexcelled Chemical Corp. v. U.S.*, 345 U.S. 59 (1953),

> Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambiguities in legislative language that must be resolved. But when Congress . . . has used language which plainly brings a subject matter into a statute, its word is final. . . .

Id. at 64. *See also Dunn v. Commodity Futures Trading Commission*, 519 U.S. 465, 470 (1997) ("Absent any indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it.") (internal quotation marks and citations omitted); *I.N.S. v. Phinpathya*, 464 U.S. 183, 189 (1984) ("This Court has noted on numerous occasions that in all cases involving statutory construction our starting point must be the language employed by Congress . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used.") (internal quotation marks and citations omitted.)

The language of § 1981a(b)(1) could not be more clear: the statute provides that a plaintiff "may" recover punitive damages when the defendant has engaged in intentional discrimination "with malice *or* with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1) (emphasis supplied). This Court has already employed this plain language in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), rejecting the notion that egregious conduct is required for punitive damages and holding that a plaintiff may not reach the jury on punitive damages if a

defendant acted in good faith and non-recklessly. *Amici* urge this Court to adopt here the standard it set forth in *Hazen*.

The *en banc* majority opinion, by importing into § 1981a(b)(1) an "egregious conduct" requirement, violates the plain meaning of the statute, necessarily either erasing the "reckless indifference" clause or adding an "egregious conduct" clause. The basis for the *en banc* majority's refusal to follow the plain meaning of the statute is the fact that Congress placed the punitive damage remedy in § 1981a rather than coupling it directly to the liability standard set out in § 2000e-5. *Kolstad*, 139 F.3d at 961. Based solely on this fact, the *en banc* majority concludes — without citation to *any* authority — that Congress could not have meant what it wrote. This reasoning is contrived. First, the damages provisions in § 1981a apply to certain intentional violations of the Americans with Disabilities Act and to certain violations of the Rehabilitation Act of 1973, not just to Title VII, 42 U.S.C. § 1981a(a)(2), -(3). It would have been quite odd for Congress to bury the damages provisions for two other statutes in the midst of Title VII. Second, *all* of the non-equitable remedies available for violations of Title VII appear in § 1981a,[9] both those for

---

[9]Back pay, front pay, and prejudgment interest are generally considered equitable monetary remedies, and have been awarded under § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g). The 1991 Act excludes from "compensatory damages" back pay "or any other type of relief authorized under § 706(g) of the Civil Rights Act of 1964." 42 U.S.C. § 1981a(b)(2). Front pay, as well as back pay and prejudgment interest, are therefore excluded from the "caps" on damages in the 1991 Act. *Kramer v. Logan County School District No. R-1*, 157 F.3d 620, 625-26 (8th Cir. 1998); *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 947-48, 951-52 (7th Cir. 1998) (affirming award of front pay in addition to the full award of compensatory damages allowed under the caps; front pay is an equitable remedy under § 706(g)(1)); Section-by-Section Analysis of Rep. Don Edwards, the floor

(continued...)

compensatory and those for punitive damages. *See* 42 U.S.C. § 1981a(a)(1) (providing for compensatory and punitive damages), (b)(1) (providing for punitive damages), (b)(3) (defining compensatory damages). Certainly, no special significance can be attributed to this unremarkable fact, and no ambiguity in the statute can be deemed to arise from it. The *en banc* majority's view that this fact in and of itself somehow demonstrates that Congress intended a higher standard for punitive damages is untenable, and does not warrant departure from the plain meaning of the statute.

C. This Court Has Defined "Reckless Indifference" to Mean Less Than Outrageous or Egregious Conduct in Numerous Contexts, Including Interpretation of Other Anti-Discrimination Statutes.

This Court's past decisions support interpreting the Civil Rights Act of 1991 consistently with its plain meaning. As an initial matter, the *en banc* majority's departure from the plain meaning of the statute is not warranted by the fact that under it, evidence sufficient to reach the jury on liability for intentional discrimination will often be sufficient to permit the jury to award punitive damages. This Court has held, "There has never been any general common-law rule that the threshold for

---

[2](...continued)
manager of the Act in the House, 137 Cong. Rec. H 9527 (daily ed., Nov. 7, 1991), referring to § 1981a as § 1977A of the Revised Statutes ("Damages awarded under section 1977A cannot include remedies already available under Title VII including back pay, the interest thereon, front pay, or any other relief authorized under Title VII."). There is no contrary legislative history. *But see Hudson v. Reno*, 130 F.3d 1193, 1202-04 (6th Cir. 1997) (front pay is legal, not equitable, and is subject to the "caps"), *cert. denied*, ___ U.S. ___, 119 S. Ct. 64 (1998).

punitive damages must always be higher than that for compensatory liability." *Smith v. Wade*, 461 U.S. 30, 53 (1983). Further,

> in situations where the standard for compensatory liability is as high or higher than the usual threshold for punitive damages, most courts will permit awards of punitive damages without requiring any extra showing.

Id. Thus, Congress need not require a plaintiff seeking punitive damages in a Title VII case to show egregious or outrageous conduct, in addition to intentional discrimination.

Past decisions of this Court and Circuit Courts confirm that Congress did not intend "reckless indifference" to mean egregious conduct. "Once a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous." *Hazen*, 507 U.S. at 617. In some instances, this Court has employed the "reckless indifference" language used in the Act, *Smith v. Wade*, 461 U.S. at 43 n. 10, while in others, it has relied on the phrase "reckless disregard," *Hazen*, 507 U.S. at 616; *Thurston*, 469 U.S. at 126, and, in general, it has used the terms "indifference" and "disregard" interchangeably in this context. *Smith v. Wade*, 461 U.S. at 38; *Thurston*, 469 U.S. at 127. None of these cases required a finding of egregious conduct to award punitive damages.

Congress' decision to adopt the "reckless indifference" standard for punitive damages in Title VII, ADA, and Rehabilitation Act cases clearly was designed to bring the various statutes proscribing discrimination in the workplace into harmony. The plain meaning of the standard for punitive damages in Section 1981a(b)(1) is identical to that found

appropriate by this Court under the ADEA,[10] and Section 1983,[11] and by numerous Circuit Courts under Section 1981.[12] This Court has also found the same standard to be appropriate for claims in other areas of the law, including under the Fair Labor Standards Act ("FLSA")[13] and in defamation cases.[14]

Reading the 1991 Act contrary to its plain meaning, and in conflict with *Hazen*, *Thurston*, and *Smith v. Wade*, makes no logical sense. It also serves to confuse employers and employees alike as to the conduct that may give rise to punitive damages for work-place discrimination. Under the *en banc* majority's approach, the same degree of culpable conduct that would subject an employer to liability for punitive damages under Section 1981 and the ADEA would not do so under Title VII. Disharmony in the anti-discrimination statutes would

---

[10] *See Hazen*, 507 U.S. 604 (1993) and *Thurston*, 469 U.S. 111 (1985).

[11] *See Smith v. Wade*, 461 U.S. 30 (1983).

[12] *See Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995); *Hicks v. Brown Group, Inc.*, 902 F. 2d 630, 654 (8th Cir. 1990); *Rowlett v. Anheuser-Bush, Inc.*, 832 F. 2d 194, 205-06 (1st Cir. 1987); *Williamson v. Handy Button Mach. Co.*, 817 F. 2d 1290, 1296 (7th Cir. 1987).

[13] *See McLaughlin v. Richland Shoe Co*, 486 U.S. 128, 133 (1988) (adopting "reckless disregard" standard from *Thurston* in interpreting when willful violation of FLSA extends its statute of limitations.)

[14] *See Gertz v. Robert Welch Inc.*, 418 U.S. 323, 348-352 (1974) (standard for punitive damages in defamation context requires showing of "knowledge of falsity or reckless disregard for the truth.").

result.[15] Moreover, the *en banc* majority's interpretation would deprive Congress of a stable vocabulary for drafting statutes. Departing from the established meaning of "reckless indifference" would confound the legislative process, upsetting Congress' natural expectation for how its words would be applied.[16] This Court in *Hazen* has already rejected an identical effort to import into the reckless indifference standard a requirement of egregious and outrageous conduct, an analysis that turns the traditional uses of these terms on their collective heads. 507 U.S. at 615-16.

Traditional understandings of "reckless indifference" support this Court's interpretation of the phrase. The *Restatement (Second) of Torts*, on which the *en banc* majority relies, observes that punitive damages are allowable for conduct that is outrageous *because of* (1) a defendant's evil motive, or (2) a defendant's reckless indifference to the rights of others. *Restatement (Second) of Torts*, § 908. According to the *Restatement*, reckless indifference is one way of showing that conduct is outrageous. *See id.* at comment b (reckless indifference may support punitive damages award). The *en banc* majority twists this notion, arguing that outrageous

---

[15] For example, intentional discrimination against African-Americans could give rise to punitive damages under Section 1981, while equally culpable conduct by the same employer against women would not be subject to punitive damages under Title VII.

[16] This Court recognized the importance of interpreting Congressional language consistently with the way that language had been interpreted before Congress acted. *See Bragdon v. Abbott*, ___ U.S. ___, 118 S.Ct. 2196, 2202 (1998) ("Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.") (citations omitted).

conduct is necessary to show reckless indifference. The result is hopelessly circular.

To reach its result, not only must the *en banc* majority add its own language to the statute, but it must do so in the wrong place, reading its outrageous conduct standard into the provision of the statute addressing the state of the mind of the defendant. Section 1981a(b)(1) sets out two requirements permitting a jury to award punitive damages. The first requirement includes the *conduct* of the defendant: the defendant must have engaged in a discriminatory practice. The second requirement addresses the defendant's *state of mind*, or *mens rea*: the defendant must have acted with malice or reckless indifference. Malice and reckless indifference are terms traditionally used to described an actor's state of mind, not his or her conduct. The commentary in the *Restatement of Torts* states, "reckless indifference to the rights of others and conscious action in deliberate disregard of them . . . may provide the necessary *state of mind* to justify punitive damages." *Restatement of Torts (2d)*, § 908, comment b (emphasis added). The language of Section 1981a(b)(1) regarding "reckless indifference" does not include or incorporate any yardstick or measure of the nature of the defendant's conduct, because it does not address *conduct* at all. The First Circuit, in refusing to read the requirement of "aggravating circumstances" into the standard for awarding punitive damages under 42 U.S.C. § 1981, similarly recognized that under the Restatement conduct is outrageous because it is done with reckless indifference, and not the other way around. The court explained,

> As *Smith v. Wade* and section 908 of the *Restatement Second of Torts* make clear, misconduct is "extraordinary" (in the language of the *Smith v. Wade* "instruction") or "outrageous" (in the language of the *Restatement*) *because of the intent of the wrongdoer*. Comment b to section 908 states that conduct is outrageous "either because the defendant's acts are done with an evil motive or because they are done with reckless indifference to the rights of others."

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 206 (1st Cir. 1987) (internal citations omitted).[17] The *en banc* majority offered no other textual basis for its "egregious conduct" standards. None exists in the statute.

D. The Legislative History of the Civil Rights Act of 1991 Offers No Basis for the "Outrageous Conduct" Standard.

The legislative history of the Civil Rights Act of 1991 does not support creating a requirement of egregious conduct for plaintiffs to recover punitive damages under Title VII. The only references *amici* could find in the legislative history to egregiousness indicated that punitive damages should be

---

[17] *Rowlett* is highly relevant to this decision because it considered and rejected the position later adopted by the D.C. Circuit in *Kolstad*, 832 F.2d at 205-06, and because Congress expressly relied upon it in enacting the 1991 Act, 832 F.2d at 205-06. Another case relied upon by Congress, *Beauford v. Sisters of Mercy*, 816 F.2d 1104, 1109 (6th Cir.), *cert. denied*, 484 U.S. 913 (1987), referred to "egregious conduct" as an *alternative* basis for punitive damages. These cases were cited in the Report of the Senate Committee on Labor and Human Resources, S. REP. 101-315 (101st Cong., 2d Sess.) at 55 (only cases mentioned in addition to *Smith v. Wade*); the Report of the House Committee on Education and Labor, H. REP. 102-40(I) (102nd Cong., 1st Sess.) at 74, 1991 U.S.C.C.A.A.N. 549, 612 (only cases mentioned in addition to *Smith v. Wade*).

available in "egregious cases." *E.g.*, Report of the Senate Committee on Labor and Human Resources, S. REP. 101–315 (101st Cong., 2d Sess.) at 7 (1990); Report of the House Committee on Education and Labor, H. REP. 102–40(I) (102nd Cong., 1st Sess.) at 65 (punitive damages under § 1981 available in "particularly egregious cases"), 1991 U.S.C.C.A.A.N. 549, 603 (1991); Report of the House Committee on the Judiciary, H. REP. 102–40(II) (102nd Cong., 1st Sess.) at 3, 1991 U.S.C.C.A.A.N. 694, 695–96 (1991); Interpretative Memorandum of Sen. Danforth and the other Republican co-sponsors of the Act, 137 Cong. Rec. S 15483 (daily ed., Oct. 30, 1991) (referring to the standard under § 1981); statement of Rep. Hyde, 137 Cong. Rec. H 9543 (daily ed., Nov. 7, 1991) ("extraordinarily egregious cases"); *but see* categorical rebuttal of Rep. Ford, 137 Cong. Rec. H 9549 (daily ed., Nov. 7, 1991).

This legislative history does not help the defendant. The phrase "egregious case" aptly describes an instance in which a defendant acts with malice or reckless indifference to the federally protected rights of a victim. Nothing *amici* have been able to find in the legislative history suggests that Congress was referring to the egregiousness of the defendant's *conduct*, as the lower court would have it, as compared to the egregiousness of the defendant's *state of mind*. Congress made abundantly clear, both in the language of the Act and in the legislative history, that it was relying on the standard set by the Court in *Smith v. Wade* and other cases, and that it intended that no higher standard had to be met under § 1981a than under other legislation. Report of the Senate Committee on Labor and Human Resources, S. REP. 101–315 (101st Cong., 2d Sess.) at 7 and 55 (equating the damages remedy with that available under § 1981 and citing *Smith v. Wade* and other cases); Report of the House Committee on Education and Labor, H. REP. 102–40(I) (102nd Cong., 1st Sess.) at 14-15, 65, and 70

(expressing desire for similarity of damages remedies under § 1981 and the 1991 Act) and 74 (citing *Smith v. Wade* and other cases), 1991 U.S.C.C.A.A.N. 549, 552-53, 603, 608, 612 (1991); Report of the House Committee on the Judiciary, H. REP. 102–40(II) (102nd Cong., 1st Sess.) at 24-28 (expressing desire for similarity of damages remedies under § 1981 and the 1991 Act) and 29 (citing *Smith v. Wade* and another case), 1991 U.S.C.C.A.A.N. 694, 717-22 (1991).

E. The En Banc Majority's Opinion Conflicts with this Court's Past Decisions.

The *en banc* majority also fails in its attempts to distinguish this Court's opinions in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1984), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), which explicitly reject in the ADEA context, the very "egregious conduct" standard created by the *en banc* majority here.

First, the *en banc* majority tries to distinguish those cases on the grounds that the ADEA requires a showing of "willfulness" on the part of the defendant for the plaintiff to recover liquidated damages. *Kolstad*, 139 F.3d at 966-67. In the ADEA cases, however, this Court held that the willfulness requirement of the ADEA can be established by a showing that "the employer knew *or showed reckless disregard* for the matter of whether its conduct was prohibited . . . ." *Hazen*, 507 U.S. at 614; *Thurston*, 469 U.S. at 126 (emphasis supplied). Thus, the *en banc* majority's distinction is one without a difference.

Second, the *en banc* majority attempts to distinguish the ADEA cases on the grounds that the ADEA does not provide for punitive damages, but rather provides for liquidated

damages that serve to double the back pay a plaintiff obtains.[18] The *en banc* panel argues that the punitive damages potentially available to a plaintiff under Title VII are somehow critically different because they are not directly tied to the actual amount of "compensatory damages" — perhaps loosely referring to back pay, or perhaps to the sum of all monetary awards. Apparently worried that a defendant who has engaged in intentional discrimination could be liable for an inappropriately large punitive damages award, the *en banc* majority contends that the difference between liquidated damages under the ADEA and punitive damages under Title VII somehow renders *Thurston* and *Hazen Paper* inapposite. However, the standard for liability for punitive damages should not be distorted to contend with concerns about inappropriately large punitive damages awards. Rather, the courts should interpret the standard for punitive damages as Congress wrote it, and rely on doctrine this Court has fashioned to deal directly with punitive damages awards that "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *See BMW v. Gore*, 517 U.S. 559 (1996).

---

[18]The *en banc* majority ignores this Court's recognition in *Thurston* that "the legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature," *Thurston*, 469 U.S. at 125, and also ignores the fact that Title VII and the ADEA are to be interpreted in the same fashion because "the substantive provisions of the ADEA were derived *in haec verba* from Title VII." *Id.* at 121 (citation and quotation marks omitted).

F. The Stated Purpose of the 1991 Civil Rights Act Is to Expand Civil Rights Remedies, Not Make Them Less Accessible.

The specific findings made by Congress in enacting the Civil Rights Act of 1991, and the specific purposes of the Act enunciated by Congress therein further support the reading of Section 1981a(b)(1) urged by *amici*.

In Section 2 of the Act, Congress made specific findings that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;" and that "legislation is necessary to provide additional protections against unlawful discrimination in employment." In Section 3, Congress set forth as two of the specific purposes of the Act "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; . . . [and] to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil right statutes in order to provide adequate protection to victims of discrimination." In light of these findings, and in order to achieve its stated purposes, Congress broadened the relief available to Title VII plaintiffs by authorizing jury trials and compensatory and punitive damages, relief that was not previously available under Title VII. Indeed, as this Court has noted, the Act "effects a major expansion in the relief available to victims of employment discrimination." *Landgraf v. USI Film Products, et al.*, 511 U.S. 244, 255 (1994). An affirmance here would dramatically narrow the circumstances under which victims of discrimination can recover punitive damages, nullifying the stated purposes of the Act.

The *en banc* majority further violates "the familiar canon of statutory construction that remedial legislation should be

construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *see also Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals*, 522-32 (1960) ("remedial statutes are to be liberally construed . . . .").

Given Congress's specific findings and stated purposes with respect to expanding the relief available to victims of intentional discrimination, and in light of the canon of statutory interpretation that remedial provisions are to be read expansively, not restrictively, the standard urged by *amici* here for punitive damages under Title VII is appropriate. Any more limited reading would defeat the specifically enunciated purposes of the Act.

G. The Reckless Indifference Standard Is Sound Policy.

Few things are as odious to our constitutional polity as intentional discrimination on the basis of immutable characteristics. Such intentional discrimination engaged in by a defendant aware of the risk of unlawfulness of its conduct is particularly harmful, and warrants heightened punishment.

Use of the reckless indifference standard established by the statute and supported by amici would *not* subject to punitive damages conduct that is intentional but done in good faith and in a non-reckless belief that the conduct fell within an exception to Title VII. As this Court held in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the reckless indifference standard does not mean that punitive damages will result in every case where disparate treatment is proved. In interpreting this standard under the ADEA, this Court explained,

> It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA. The ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a 'bona fide occupational qualification' defense, and exempts certain subject matters and persons. If an employer incorrectly but in good faith and non-recklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed.

Id. at 616 (internal citations and parentheticals omitted). The same reasoning applies to imposing punitive damages under Title VII. Prior to *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), for example, an employer who excluded women capable of bearing children from positions of employment that exposed them to dangerous levels of lead, believing that such a measure fit within the bona fide occupational exception to Title VII, likely would not be subject to punitive damages. *See* Section 703(e)(1) (allowing discrimination under Title VII on the basis of "religion, sex, or national origin in those instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise"). A good faith effort to abide by Title VII does not reflect the reckless indifference necessary for an award of punitive damages. This position is in no way inconsistent with this Court's conclusion in *Hazen*: "Once a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant, rather than a determinative, factor in the employment decision." *Hazen*, 507 U.S. at 617.

Moreover, in no event is the jury *required* to award punitive damages. Section 1981a(b)(1) states that a plaintiff "may" recover punitive damages, not that the plaintiff is entitled to punitive damages, where a defendant intentionally discriminates with "reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). To impose punitive damages, a jury must reach two conclusions, first that the defendant acted with either malice or reckless indifference and, second, that punitive damages are appropriate. *See Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 206 (1st Cir. 1987) ("In *Smith v. Wade*, the [Supreme] Court discusses the finding of recklessness, *i.e.*, the requisite level of *intent*, as a 'threshold' beyond which the jury may in its 'discretionary moral judgment' award punitive damages.") (emphasis in original) (citing *Smith v. Wade*, 461 U.S. 30, 52 (1983)).

By making punitive damages available in Title VII cases, Congress chose to establish an additional means for punishing defendants who have engaged in intentional discrimination with malice *or* with reckless indifference to the rights of their victims. In the view of *amici*, this additional punishment reflects the well-settled principle that our anti-discrimination statutes are of the "highest priority" and that "in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment due to discrimination. . . ." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976). Title VII has two distinct, but related, central statutory purposes: (1) eradicating discrimination throughout the economy, and (2) making persons whole for injuries suffered through past discrimination. *Landgraf v. USI Film Products, et al.*, 511 U.S. 244, 254 (1993). Just as adding compensatory damages to back pay serves both statutory purposes, the addition of punitive damages to other monetary relief serves the deterrent function. Each

remedy is "part of a complex legislative design directed at a historic evil of national proportions. A court must exercise this power in light of the large objectives of the Act." *Albemarle Paper Co. et. al. v. Moody, et. al.*, 422 U.S. 405, 416 (1975).

Congress has exercised its prerogative to further one of the central purposes of Title VII — deterrence of all forms of discrimination throughout the economy — by carefully crafting a rule that reserves greater punishment for intentional discrimination undertaken with malice or with reckless indifference, while still protecting defendants, while they are guilty of such discrimination, acted without malice and without reckless indifference for the rights of individuals.

The rule adopted by the *en banc* majority upsets this careful balance by limiting punitive damages to only the most "outrageous" and "egregious" conduct. Had that been Congress' intent, it certainly could have so provided. Instead, Congress chose language with a plain meaning, familiar to Congress and the courts from this Court's own jurisprudence. As Justice O'Connor has explained, the Court's "task is not the hopeless one of ascertaining what the legislators who passed the law would have decided had they reconvened to consider [the] particular cases. Rather, it is to determine whether the language the legislators actually enacted has a plain, unambiguous meaning. In this instance, we believe it does." *Beecham v. U.S.*, 511 U.S. 368, 374 (1994).

There is no basis in the plain language of the statute, nor in the legislative history, nor in this Court's jurisprudence, for the *en banc* majority's view that plaintiffs should not be able to obtain punitive damages under Title VII unless they can show malice or outrageous conduct. As this Court held in *Smith*, there is "no reason why a person whose federally guaranteed

rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action." *Smith*, 461 U.S. at 48-49. As this Court explained in *Smith*, punitive damages traditionally have been, and are, available to plaintiffs in a variety of contexts under tort law upon a showing of conduct that does not rise to the level of "outrageous" or "egregious" conduct. *Smith*, 461 U.S. at 38-49 (exhaustively tracing the history of punitive damages law). There is no principled basis for requiring a higher showing by a victim of intentional discrimination.

IV. CONCLUSION.

Nothing in the plain meaning of Section 1981a(b)(1) supports the *en banc* majority's wholesale creation of an egregious conduct standard for imposition of punitive damages under Title VII. Rather, as set forth unambiguously in the statute, punitive damages should be available to plaintiffs who have established that a defendant has intentionally discriminated, unless it has acted without malice or reckless indifference, the standard this Court has already adopted in *Hazen* and its predecessors. No higher standard should be adopted here.

Respectfully submitted,

James M. Finberg
Counsel of Record
Jonathan D. Selbin
Joshua P. Davis
Paulina do Amaral
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, California 94111-3339
Telephone: (415) 956-1000

Jack W. Londen
Daniel F. Kolb
Co-Chairs
Norman Redlich
Trustee
Barbara R. Arnwine
Thomas J. Henderson
Richard T. Seymour
Teresa A. Ferrante
Lawyers' Committee for Civil Rights Under Law
1450 G Street N.W.
Suite 400
Washington, D.C. 20005
Telephone: (202) 662-8600

Dennis C. Hayes
General Counsel
Willie Abrams
Assistant General Counsel
National Association for the Advancement of Colored People
4805 Mt. Hope Drive
Fifth Floor
Baltimore, Maryland 21215
Telephone: 410-486-9191

Antonia Hernandez, President
Patricia Mendoza, Regional Counsel, Chicago Office
Amalia Rioja, Staff Attorney, Chicago Office
MALDEF
634 South Spring Street
Eleventh Floor
Los Angeles, CA 90014
Telephone: 213-629-2516

Judith L. Lichtman
Donna R. Lenhoff
National Partnership for Women & Families
1875 Connecticut Avenue, N.W.
Suite 710
Washington, DC 20009
Telephone: 202/986-2600

Judith C. Appelbaum
National Women's Law
Center
11 Dupont Circle, N.W.
Suite 800
Washington, D.C. 20036
Telephone: 202/588-5180

Martha F. Davis
Yolanda S. Wu
NOW Legal Defense and
Education Fund
99 Hudson Street, 12th Floor
New York, New York 10013
Telephone: 212/925-6635

Steven R. Shapiro
American Civil Liberties
Union
125 Broad Street
New York, N.Y. 10004
Telephone: 212/549-2611

Counsel for *Amici Curiae*